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In the Supreme Court
OF THE
United States

OCTOBER TERM 1974

No. 74-888

THOMAS RALEY,
Petitioner,

VS.

LEAGUE TO SAVE LAKE TAHOE, SIERRA CLUB, WALTER BAILEY, and BRIAN HAYES,
Respondents.

Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. Exhibit B) is not yet reported. The opinion of the district court (Pet. Exhibit A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1974. The petition for a Writ of

Certiorari was filed on January 20, 1975 by one of the individual party defendants in the action below.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court had federal question jurisdiction under 28 U.S.C. 1331, when respondents' complaint stated causes of action founded upon claims requiring judicial construction of the terms of an interstate compact consented to by the Congress, pursuant to Article I, §10, Cl. 3 of the Constitution of the United States.

LAWS AND STATUTES INVOLVED

The Tahoe Regional Planning Agency Compact, Public Law 91-148, 83 Stat. 360 (1969) (Pet. Exhibit C); 28 U.S.C. 1331(a); Article I, §10, Cl. 3 of the United States Constitution.

STATEMENT OF THE CASE

This action for declaratory and injunctive relief, brought by the League to Save Lake Tahoe and the Sierra Club against the Tahoe Regional Planning Agency, sought judicial construction and agency enforcement of the terms and requirements of the federal statute, Pub. L. 91-148, 83 Stat. 360 (1969), consenting to and embodying the Tahoe Regional

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[1]The compact agency itself, an appellee below, is not petitioning for a Writ of Certiorari.

Planning Compact. The action further sought injunctive relief against defendants, Thomas Raley, Park Cattle Co., and Harvey's Wagon-Wheel, Inc., all of whom have received approvals from the Tahoe Regional Planning Agency for shopping center or gambling casino projects in the Tahoe Basin. Jurisdiction was invoked under 28 U.S.C. 1331(a).

In 1968, the states of California and Nevada entered into a bi-state compact to create a regional agency with extensive powers to regulate and control development within the Lake Tahoe Basin in order to preserve its natural resources and fragile ecology. The Compact was submitted to the United States Congress for its consent pursuant to the requirements of the Compact Clause of the United States Constitution, Article I, §10, Cl. 3, and federal statutes regulating the pollution of interstate waters and air (33 U.S.C. 1253(b); 42 U.S.C. 1857a).

In 1969, Congressional consent was given to the Compact pursuant to a statement of federal purpose and subject to specific conditions. The statement of federal purpose, the Compact, and the conditions were embodied in a federal statute, Pub. L. 91-148, 83 Stat. 360 (1969). (Pet. Exhibit C) In such form, the Compact was accepted by both states. The statement of Federal purpose reflected the intention of Congress to "encourage the wise use and conservation of the waters of Lake Tahoe and the resources of the area around said Lake" in order to preserve the Lake Tahoe region as a national resource for recreation, sound water and forest management, and fish and

wildlife preservation.[2] Thus, the Compact is concerned with regulating, through land use controls, the environmental problems of an area not subject to the control of a single state.

Respondents' complaint alleged the Tahoe Regional Planning Agency had failed to comply with the legal requirements of the Compact when it approved a large shopping center and two gambling casinos which would adversely affect the environment in the Basin. The legal validity of respondents' principal claims turned upon the meaning and construction of the terms of the Compact in the light of the Congressional purposes in enacting Public Law 91-148. Respondents' claims, *inter alia*, sought implementation of the Compact's requirements that a legally adequate plan with five correlated elements be approved by the Agency (Article V(b)); that ordinances, specified by the Compact, supplementing the plan (Article VI(a)) be approved by the Agency; and that ordinances, when adopted, be consistent with the plan and "effectuate" the plan (Article VI(a)).

The district court's order of November 27, 1973, directing dismissal, stated that the action did not arise under the Constitution of the United States and that the Compact was not a "law of the United States" within the meaning of 28 U.S.C. 1331(a).

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[2]The United States Forest Service is the largest single landowner in the Basin, administering a total of 115,739 acres (57% of the land in the Basin). Hearings, "Environmental Problems of the Tahoe Basin," Subcommittee on Air and Water Pollution, Committee on Public Works, U.S. Senate, 92nd Congress, August 21, 1972, p. 4.

The court of appeals for the Ninth Circuit held that where causes of action are asserted arising under an interstate compact, a federal question exists within the meaning of 28 U.S.C. 1331(a), since a compact is a "law of the United States." In making this determination the court of appeals relied upon cases decided by this Court, principally *Delaware River Commission v. Colburn*, 310 U.S. 419 (1940); *Dyer v. Sims*, 341 U.S. 22 (1950); and *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959). In *Colburn* and *Dyer v. Sims*, this Court held that a claim requiring construction of an interstate compact is cognizable under the provision for Supreme Court review, by Writ of Certiorari, of judgments of the highest state court, where "any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of . . . the United States." 28 U.S.C. 1257(3). The court of appeals noted that:

> in reaching this interpretation of the certiorari statute, *Colburn* and its progeny have firmly established that the construction of a compact, by virtue of Congressional consent, presents a federal question. . . . [W]e conclude after investigation that the result there [in *Colburn*] was based upon the implicit finding that the interstate compact involved must have been deemed to have been a "statute of the United States" within the meaning of 28 U.S.C. 1257(3). Neither logic nor policy justifies a different interpretation of the substantially similar language in 28 U.S.C. §1331(a). (Pet. Exhibit A, pp. 6-8)

The Court also held that to erect a distinction between what constitutes a federal law for certiorari purposes and what constitutes a federal law for original jurisdiction purposes would be artificial, unnecessary and irrational, where there is satisfaction of the requirement that the federal question forms an essential element of the claims set forth in the complaint. *Gully v. First National Bank,* 299 U.S. 109 (1936).

Finally, the court concluded that post-*Colburn* decisions of the Supreme Court and strong policy considerations supported the conclusion that the construction of an interstate compact is a matter of federal law, not the law of the party states. *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. at 279-280. In so concluding the court of appeals commented that:

> Thus, any rights or obligations granted by an interstate compact are federal, not state, in character. As a result, there can be no doubt of the propriety of original jurisdiction in the federal courts in the case before us, despite the legitimate and far-reaching interests of the party states. (Pet. Exhibit A, p. 10, note 13)

With reference to the particular compact at issue in this case, the court of appeals characterized the Compact as dealing "with much more than mere local concerns such as zoning and land use" but rather "with the environmental problems of an area not subject to the control of a single state." (Pet. Exhibit A, p. 11) In addition to the specific Congressional con-

cern for the subject of the Compact, evidenced by the statement of purpose accompanying the consent, the court noted that Congress has with increasing frequency evinced a strong interest in solving environmental problems, which by their very nature transcend state boundaries, through interstate cooperation. Finding original jurisdiction under 28 U.S.C. 1331(a) for claims, requiring construction of the Compact "serves these important national interests." (Pet. Exhibit A, p. 1)

REASONS FOR DENYING PETITIONER'S PETITION FOR CERTIORARI

There is no conflict in the circuit courts of appeals with reference to the question of whether there is federal question jurisdiction with regard to claims requiring construction of an interstate compact.[3] As noted in the Statement of the Case, the thorough and closely reasoned court of appeals opinion was based upon decisions of this Court clearly warranting the conclusion that federal question jurisdiction would be appropriate in this case.

Under the principles set forth in decisions of this court, the construction of a compact sanctioned by

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[3]On the contrary, there is agreement, at least in *dictum* or *sub silencio*. Original Federal District court jurisdiction as to a question involving construction of a bi-state compact was found, without discussion, in *Kansas City v. Fairfax Drainage District*, 34 F.2d 357 (10th Cir. 1929). In *Scenic Hudson Preservation Conf. v. Fed. Power Comm.*, 453 F.2d 463, 493 n. 6 (2nd Cir. 1971), the court noted that "Congressional approval of the compact . . . would seem to raise the compact to the status of federal legislation." See also Hart, Relations Between State and Federal Law, 54 *Col. L. Rev.* 489, 538-539, ns. 200, 201.

Congress under the Compact Clause of the United States Constitution, Article I, §10, Cl. 3, presents a federal question. *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275 (1959); *Dyer v. Sims,* 341 U.S. 22 (1950); *Delaware River Joint Toll Bridge Commission v. Colburn,* 310 U.S. 419 (1940); and see *Hinderlider v. La Plata River and Cherry Creek Ditch Company,* 304 U.S. 92, 111, n. 12 (1938).

In *Petty, supra,* this Court was called upon to determine whether the states, parties to a bi-state agreement, had waived their rights under the 11th Amendment to the United States Constitution, which requires consent by a state to a suit by a citizen of another state. This Court construed language in the compact itself as granting a waiver of 11th Amendment rights, and concluded that:

> ". . . where the waiver is, as here, claimed to arise from a compact between several states, the Court is called on to interpret not unilateral state action but the terms of a consensual agreement, the meaning of which, because made by different States acting under the Constitution and with congressional approval, is a *question of federal law." Petty, supra,* 310 U.S. at 419.

Respondents' claims, as stated in their complaint, require judicial construction of the Compact itself (and enforcement of essential Compact requirements) in light of the Congressional purpose "to encourage the wise use and conservation of the waters of Lake Tahoe and of the resources of the area around the lake." Regional, inter-state, powers come into existence only by sanction of the Congress, acting pur-

suant to its powers under the Compact Clause of the Constitution. Such regional powers cannot be said, therefore, to be state powers, since states have no such powers outside of their territorial boundaries. It is therefore entirely proper, under *Petty* to characterize respondents' claims relating to the Compact and the duties of the land use planning agency established by the Compact as federal questions within the meaning of 28 U.S.C. 1331(a).[4] It, moreover, follows under *Petty*, that the Compact is a "law" of the United States for the purpose of 28 U.S.C. 1331(a).

Respondents additionally argued below that disposition of claims requiring construction of the provisions of a compact requires the application of federal common law and, therefore, such claims arise under the "laws" of the United States within the meaning of 28 U.S.C. 1331(a).[4] This court has determined that construction of the provisions of an interstate compact involves application of federal law. *Dyer v. Sims, supra; Petty v. Tennessee-Missouri Bridge Commission, supra.*

Since the decision of this Court in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), it is undisputed that a controversy requiring the application of federal common law arises under the laws of the United States within the meaning of 28 U.S.C. 1331(a). A case arises under a law of the United States if the dispositive issues stated in the complaint disclose a need for application of such a law. *Ivy Broadcasting Co. v. American Tel. and Tel. Co.*, 391 F.2d 486 (2d

[4]The court of appeals did not rule with regard to this contention.

Cir. 1968). The issues stated in respondents' complaint disclose a need for the application of federal common law to construe the terms of a bi-state compact. It necessarily follows, under *Illinois v. City of Milwaukee, supra,* that there is federal question jurisdiction in the present case.

Rule 19(1)(b) sets out criteria for the granting of a Writ of Certiorari. None of these criteria is satisfied here. There is no conflict among the courts of appeals with regard to the appropriateness of treating claims requiring construction of an interstate compact as federal questions under 28 U.S.C. 1331(a); and the court of appeals decision herein, thorough and cogently reasoned, is consistent with holdings of this Court. Finally, this compact, approved by Congress, attempts to provide a mechanism for sound land use planning in an ecologically fragile area, not subject to the control of a single state, where water and air quality have been degraded as a result of actions by the defendant compact agency, and other governmental authorities in the Basin, authorizing allegedly unlawful, environmentally unsound development. Claims arising under that compact, relating to promotion of the federal objective to protect the environment of the Basin, are clearly federal questions.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Court should deny Petitioner's request for a Writ of Certiorari.

Dated, San Francisco, California,
February 12, 1975.

Respectfully submitted,
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